

WEBINAR WEDNESDAYS



Wednesday, August 18, 2020

OPENING STATEMENTS

Presented by:

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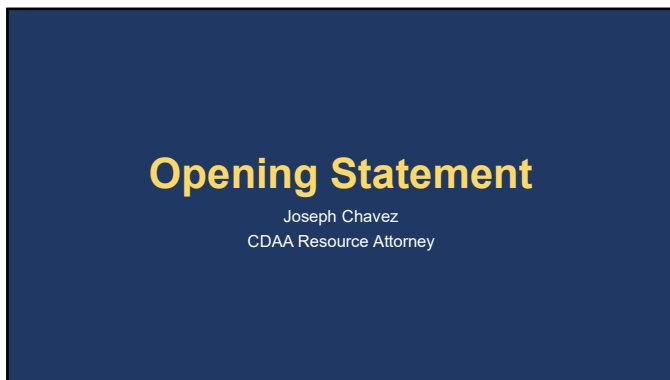
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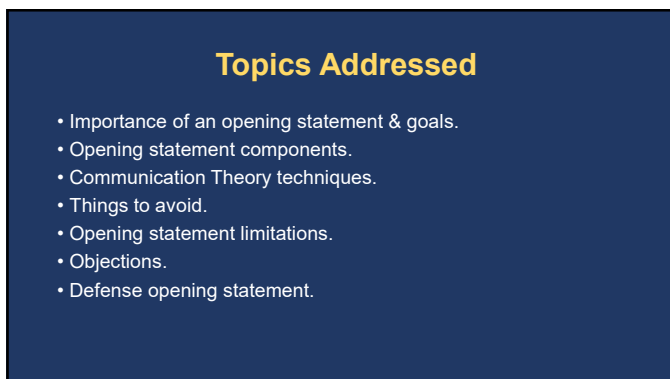
ELIZABETH BURTON ORTIZ
EXECUTIVE DIRECTOR



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Why Do an Opening Statement?

- Jurors first chance to hear a coherent & complete summary of your case.
- At no other time is the jury more attentive & receptive to your case.
- Jury's first impression of your case & initial impressions are lasting.
- Phenomenon of primacy & recency: jurors tend to remember the information they heard first & last.
- A prepared & well-crafted opening statement creates an impactful & lasting impression throughout the trial.

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Why Do an Opening Statement?

- A "Roadmap" for the jury.
- The main objective of the Opening Statement is to persuade the jurors.
- The jury's view of you, your knowledge, your competence, and preparation is formed largely in Opening Statement.

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Why Do an Opening Statement?

- Purpose of an opening statement is to advise jury of questions and issues involved in the case so that it will have a general idea of the evidence and testimony to be introduced during trial. *State v. Eisenlord* (App. Div.1 1983) 137 Ariz. 385, 670 P.2d 1209.

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Why Do an Opening Statement?

- The object of an opening statement is to apprise the jury of what the party expects to prove and prepare the jurors' minds for evidence which is to be heard.

State v. Prewitt (1969) 104 Ariz. 326, 452 P.2d 500.

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Why Do an Opening Statement?

- Purpose of opening statement is to advise jury of facts relied on and of questions and issues involved, so that jury will have a general picture of facts and will be able to understand the evidence.

State v. Burrnell (1965) 98 Ariz. 37, 401 P.2d 733.

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Goals

- Inform the jury of:
 - Nature of the case.
 - Charge(s).
 - Main Facts / Key Witnesses.
 - Your Case Theory, including Theme

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Goals

- Capture jury's attention.
- Build rapport.
- Have jury gain confidence in you and the prosecution case.
- Opportunity not only to impress the jurors' with your command of the case but also your command of the courtroom.
- Don't lecture, let them in, story telling technique.
- Address "problematic" evidence/ prepare jury for negative evidence.

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Goals

- Tell a clear & compelling overview of the case, so the jury knows what to look forward to.
- An effective presentation will allow the jury to gauge the relative importance of each piece of evidence and place those necessary but less significant witnesses & exhibits in their proper perspective.
- Knowing what to expect in the unfolding case will assist jurors when the evidence is presented out of order, which is often unavoidable.

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Goals

- Tests:
 - Will the jury want to convict after your opening?
 - Can you deliver what you promised in your opening?

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Analytical Advocacy

- The Opening is not an isolated component of your case.
- Your Opening Statement should tie into the Theme you started in voir dire & should tie into your Case Theory.
- It is important to have a Case Theory that can be thread throughout all parts of the trial.
- The Opening statement should link together themes referenced in voir dire and intend to use in closing argument.

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Opening Statement Components

- Prepared opening & closing lines need to be powerful & memorized.
 - Attention step – your theme statement or advantageous Fact Capsule.
 - Exit Line – find Defendant guilty based on the evidence.
- Fact Narration: Everything else, including problematic evidence should be in the middle.

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Opening Statement Components

1. Attention Step
2. Fact Narration
3. Exit line

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Opening Statement Components

1. Attention Step:

- The first minute, or less, of the opening statement.
- Used to explain your Theme or advantageous Fact Capsule.
- Purpose is to capture the juror's attention.

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Opening Statement Components

2. Fact Narration:

- The body of the Opening Statement.
- Use to present Case Theory from the best vantage point, or from the perspective of a significant witness, or in the best time sequence, or from the most effective standpoint.
- The choice should provide the most efficient & effective communication to the jury.
- Purpose is to enable the jury to understand the case quickly & completely.

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Opening Statement Components

3. Exit Line:

- The last minute, or less, of the opening statement.
- Used to explain the essence of the case by encapsulating the theme.
- Find the Defendant guilty based on the evidence.

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Attention Step

- Start Strong, take advantage of Primacy.
- First spoken words should grab the jurors attention & and give them something to hold to throughout the entire trial.
- Avoid wasting your important first words on ritualistic statements:
 - "This is my Opening Statement..."
 - "This is not evidence but my Opening Statement..."

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Attention Step

- Three approaches to grab jury's attention & draw them in:
 - Victim.
 - Defendant.
 - Offense.
- The structure you choose should best explain your Case Theory & Theme.

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Attention Step

- Focus on the Victim:
- Start out with Victim pre-crime:
- "February 24, 2019, started out as a normal workday for Katherine Weber, it ended with her in the hospital with a broken arm and black eye due to what this man did to her..."

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Attention Step

- Focus on the Defendant:
- Start with what the Defendant did:
- "This is a case about a man who would not take no for an answer."

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Attention Step

- Focus on the Offense:
- Start out with the crime itself:
- "This is a case about a violation of trust – the most fundamental trust – the trust a child should be able to have in her parent."

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Attention Step

- Focus on the Offense:
- Start out with the crime itself.
- DUI Theme unsafe behavior.

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Attention Step

- "Officer Cooper stopped the Defendant's car after watching him serve back and forth into the other lane. He watched the defendant cover a distance of approximately one-mile driving in this manner. He felt he should pull the defendant over because he believed, based on his 11 years of experience as a State Trooper, that the defendant may have been under the influence of alcohol and was a safety hazard to other cars and pedestrians on Buckeye Road."

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Attention Step

- Focus on the Offense:
- Start out with the crime itself.
- Petty theft.
- "George Johnson was a security guard for Safeway and was assigned to pay careful attention to the liquor aisle because of a big increase of shoplifting losses in recent weeks."
- If recent security precautions were put into place, such as extra surveillance cameras or newly hired security officers due to increased losses, include those facts.

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Fact Narration

- **Organization:**
- Chronological order of events:
 - Logical & easy to follow.
 - But may not give appropriate emphasis to key parts of the case.
 - Can be more difficult than it seems if you have a complicated case where multiple witnesses are involved in simultaneous activities.

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Fact Narration

- **Organization:**
- Chronological variation:
 - Describe the case by witness testimony.

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Fact Narration

- **Organization:**
- Describe the case by referencing significant pieces of evidence.
- Creative & effective method with circumstantial evidence cases with little direct evidence.
- Fingerprint, shoe print, tire print case.
- Hit and run case where the damaged car part left at the scene matched the defendant's car.

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Fact Narration

- **Organization:**
- Course of Investigation:
 - Allows the jury to put together evidence like detectives.
 - Effective if physical evidence is a large part of the case.
- Combination of Chronological & Course of Investigation is often the best way to integrate the crime with the evidence.

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Fact Narration

- Refer to the defendant formally.
- Pointing considerations.
 - Egregiousness of the case.
 - Middle ground approach.

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Fact Narration

- **Persuasiveness:**
- Avoid "I" or "We".
- Do not tell the jury what you are going to do – "I am going to show, prove, present, ect..."
- If you want to tell the jury what is coming, put them in the driver's seat: "You will have an opportunity to meet (witness name) and hear in her own words what she endured that night."

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Fact Narration

- **Persuasiveness:**
- Do not hold back powerful evidence for your case-in-chief or rebuttal argument.
- Make that strong impression with the jury first, and you make a lasting impression throughout the trial.
- Know the elements of the crimes and weave them into the Opening statement facts.
- If there are multiple counts, explain during the Opening where each count is committed or completed.

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Fact Narration

- **Persuasiveness: Painting the scene**
- Example:
 - "The defendant walked into the store, went to the back, took something out of the refrigerated section, and then left."
- This "action only" statement does not address:
 - Defendant's intent.
 - Witness' credibility.
 - Leaves the defense wide open.

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Fact Narration

- **Persuasiveness: Painting the scene**
- Mark Jones was the clerk at the 7-11 store. Although it was late at night, the store was really well lit.
 - Florescent lights throughout
 - Small interior
- Jones stood behind the counter
 - Counter only waist high
 - In center of the store
 - Merchandise racks only 4 foot high
 - Could see the entire interior of the store

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Fact Narration

- Jones immediately noticed the Defendant enter through the only door.
 - From approx. 10 feet from Jones' counter.
 - No one else in the store at the time.
 - They made eye contact
- Jones watched closely as:
 - Defendant walked to the back of the store.
 - Defendant looked back at Jones while walking to the back.

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Fact Narration

- Defendant reached the tall glass fridge
 - Kept his back towards Jones.
 - But Jones could see Defendant put his hand on the silver door handle.
 - Open the fridge, take something out, and put it in his jacket.
 - Defendant then quickly turned around and immediately walked out the front door without looking at Jones again.
- Addresses credibility & intent.

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Fact Narration

- **Exhibits:**
- If they see photos of the store where the shop lifting occurred, when you describe the actions of the witnesses/defendant, the jury will visually be able to follow these movements on the photo.
- Defendant's intent is going to come from the factors of your scene.

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Fact Narration

- **RAJI Preliminary Criminal 10 Credibility of Witnesses:**
- Use to address specific credibility topics during Opening.
- Example: Jane Doe will testify and you will learn that she:
 - Had ample opportunity to observe the Defendant;
 - Had no existing bias against him;
 - Made several consistent statements to law enforcement & medical personnel as to what occurred.

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Fact Narration

- **Detailed evidence:**
- Summarize to persuade.
- Inferences vs. minutia. Example: FSTs.
- "the Defendant showed balance & coordination problems as well as mental and central nervous system impairment during the FST's, all indicating he was under the influence of alcohol."

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Fact Narration

- **Detailed evidence:**
- Summarize to persuade.
- Inferences vs. minutia. Example: theft.
- "You will hear that Detective Smith went through voluminous bank records and found a pattern. Each of the 30 checks went into one of the Defendant's business accounts."

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Fact Narration

- **Detailed evidence:**
- Summarize to persuade.
- Inferences vs. minutia. Example: DNA
- "You'll hear how DNA tests are performed, and that there is only a 1 in 25 million chance the semen found on the victim's body came from someone other than this Defendant."

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Fact Narration

- **Problematic Evidence:**
- Address problems proactively; not defensively.
- This conveys to the jury that you are aware of the issue and that the Defendant is still guilty.
- This will enhance your credibility with the jury.
- An effective Case Theory and Theme can turn a negative into a positive.
- Turn case weaknesses into strengths.
 - "I did not pick the victim; the Defendant did."
- Defuses defense impact by addressing the issue first.

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Fact Narration

- **Problematic Evidence: Use facts & evidence to make your point:**
- DUI: no bad driving example:
 - Officer Smith followed the Defendant for two blocks and he did not commit any traffic violations except for a broken taillight.
 - But... you'll also hear a forensic alcohol expert explain that the manner of driving is only one of many indicators of a person who is under the influence of alcohol, and...
 - That the Defendant's appearance, his odor, his poor FST performance, and his .10% Blood alcohol level all indicate that he was driving under the influence.

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Fact Narration

- **Problematic Evidence: Use facts & evidence to make your point:**
- DV – recanting Victim
- The argument that you want to say but can not:
 - "You should believe what she said at the time, and not the story she's making up now."

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Fact Narration

- **Problematic Evidence:** Use facts & evidence to make your point:
- Debbie Jones:
- The mother of a three year old child.
- She has never worked outside the home.
- She has no family in town, and only a few friends.
- Defendant's income is her only source of financial support for her and her daughter.
- She is completely dependent on him.

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Fact Narration

- **Problematic Evidence:** Use facts & evidence to make your point:
- But on September 1, 2018, as the Defendant was terrorizing her, none of that mattered as much as the safety of her child, so she called the police. She told them...

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Fact Narration

- **Problematic Evidence:**
- With an unlikeable victim, consider the theme that defendant chose the victim well, and counted on the fact that no one would believe the victim or care.
- With a consent defense to rape, consider the theme that the victim trusted the wrong man, and defendant abused that trust.

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Fact Narration

- **Problematic Evidence:**
- Sexual assault case involving victim who drank too much:
- Consider, "Like many people have done at some point, Mary Amato, had too much to drink. She made a mistake, only she didn't pay for it with a hangover, or feeling lousy the next day. This was a mistake for which she paid dearly."

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Fact Narration

- **Repetition:**
- Your Opening should repeat the themes you developed in voir dire, it should anticipate your evidence, and develop the pattern for your closing argument.
- Repetition, just like Primacy & Recency, has a psychological impact on the juror's memory.
- You can take advantage of this by carefully and effectively repeating some key issues in your Opening.

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Fact Narration

- **Repetition:**
- In a DUI case:
- You can explain what symptoms the defendant displayed;
- How an experienced officer recognized these symptoms of intoxication;
- How the toxicologist will repeat that these same symptoms are the ones **all** people show when under the influence of alcohol;
- And thus the defendant was DUI.

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Fact Narration

- Toward the end you should tell the jury once in the Opening that your statement is not evidence.
- This will avoid appellate claims that you misled the jury and the defense attorney argument that you were attempting to mislead the jury.
- It also is helpful if the defense attorney takes liberties during opening statement.
- Do so in a positive manner: "The evidence will show..." or "the witness will prove..."
- Avoid: "I **believe** the evidence will show" or "We **expect** the evidence will prove..."

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Exit Line

- **Be definitive & unequivocal;** consider:
- There's a name for what Defendant did. In Arizona, its called (name of offense)"
- At the conclusion of the evidence, you will be convinced that the defendant is guilty of..."
- "The defendant is charged with the crime of _____. The evidence you hear will prove to you that is exactly what he did."

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Exit Line

- Use key phrases to finish strong; consider:
- "The evidence is clear, straight-forward, and overwhelming."
- "The evidence all fits together and adds up to only one reasonable conclusion."
- "At the conclusion of the case, there is only one person who could have done it, and he sits right there."
- "You will see there is only one explanation for the evidence, and that is that the defendant is guilty."

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Communication Theory Techniques

- Make eye contact with jurors.
- Speak clearly; know correct pronunciations.
- Vary your volume & speed.
- Move with purpose.
- Remain professional & confident.
- Use plain language:
 - avoid legal jargon
 - avoid cop talk
 - avoid unnecessary big words.

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Communication Theory Techniques

- Adjust your tone to case specifics:
 - Outrage for violent crimes.
 - Business-like for financial crimes.
- Avoid using podium as lectern
 - Don't lecture jurors.
 - You are sharing; letting them in.

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Communication Theory Techniques

- Humanize the case and parties/witnesses involved, especially those in the State's case.
- The victim is someone who lives in the community, not just a crime statistic.
- This reinforces your objective of demonstrating that you care about the case.

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Communication Theory Techniques

- Use descriptive/powerful words for persuasiveness
 - "Defendant swerved his car across the street & slammed into a brick wall, which sounded like an explosion to the witnesses."
 - "Defendant was in rage."

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Communication Theory Techniques

- Explain the facts of the case in the present tense, focusing the jurors' attention on relevant conduct & events.
- Not on what each witness will testify to in court.
 - Avoid Jane Doe will testify to...

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Communication Theory Techniques

- Alternative phrases:
 - "You will hear from Mark Jacobs that..."
 - "Jane Jacobs will tell you..."
 - "You will learn..."
 - "You will hear..."

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Communication Theory Techniques

- Best technique is to tell what happened in narrative style. For example, rather than stating:
 - "The evidence will show that the victim received two cracked ribs due to blunt force trauma."
 - State, "Mary Newton suffered two cracked ribs as a result of the beating the defendant inflicted upon her".

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Communication Theory Techniques

- Avoid lecturing the jury; instead let them in on what happened.
- Be conversational. Talk to the jury, not at the jury.
- Examples:
 - Use "got out of the car", Not "exited the vehicle."
 - Use "watched the house", Not "surveilled the residence."
 - Use "the defendant said", Not "the defendant related to the officer..."

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Communication Theory Techniques

- State facts, not conclusions. Use active voice.
- Examples:
- Use "Officer Miller found the defendant hiding in the master bedroom closet."
 - Not "we believe the evidence will show that the defendant tried to avoid detection by hiding in the closet".

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Communication Theory Techniques

- State facts, not conclusions. Use active voice.

Examples:

- Use "the defendant was driving 45 miles per hour in a 35 miles per hour zone, weaving from lane to lane, with his lights out."
- Not "The officer will explain that the defendant exhibited a driving pattern similar to that of a driver driving under the influence by manifesting certain bad driving behaviors."

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Communication Theory Techniques

- If your witnesses draw conclusions/opinions regarding the defendant's guilt, you can describe their determinations:
- Tell the jury that the two police officers involved in your DUI case have 9 and 11 years of experience between them for a total of 20 years of experience, and following their "expert" evaluation of the defendant, they arrested the defendant for being under the influence of alcohol.
- This will communicate that it is their "expert opinion" that the defendant was DUI.

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Communication Theory Techniques

- Alcohol Toxicologist expert: don't just tell the jury that he/she will testify that the defendant was under the influence of alcohol.
- Tell the jury what all those symptoms & indicia of alcohol are so that when the various witnesses testify about the symptoms they observed, the jurors will understand their significance and see how they show the defendant was DUI.
- Explain that the expert will describe how the defendant's symptoms were consistent with his blood alcohol level & intoxication.

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Communication Theory Techniques

- Alcohol Toxicologist expert will also reinforce the officer's credibility.
- So when officer testifies (prior to the toxicologist) about the symptoms & indicia of alcohol he observed, the jurors will recall the information they received in Opening Statement about the Toxicologist and the officer's credibility will be enhanced, particularly during cross examination.
- All based on your opening statement.

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Communication Theory Techniques

- If you do not know what the witness is going to say (DV, gangs, child witness), you can let the jury know.
- Focus on what the witness told law enforcement or prior testimony.

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Communication Theory Techniques

- Acknowledge the difficulty the victim will have & the uncertainty of what she will say:
 - "During their relationship, Jane Doe learned to cover up, say nothing to the police, survive without making waves. Last August, she found the courage to call 911 & report what was happening. And today she will come into this courtroom, in front of the same man that beat her, and try to find the strength & courage to tell you what happened."

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Communication Theory Techniques

- Personalize your witnesses & victims.
- If the investigating officer will be sitting next to you during the trial introduce him/her.
- Refer to defendant formally.
- Warn jurors about uncomfortable testimony
 - "You will be asked to listen to graphic sexual terms".
- Use defendant's words; don't sanitize them. But make it clear that you are quoting the Defendant.

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Communication Theory Techniques

- Use Exhibits
- 911 call, crime scene photos, weapon used during offense.
- Exhibits drive home your evidence because jurors understand & retain information better when they see and hear it.
- Let the court and counsel know in advance.
- Make sure the exhibits will be admitted.

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Communication Theory Techniques

- Diagrams/photos are very useful to orient the jury.
- Provide a clear visual perspective to the evidence which allows the jury to more accurately follow your Opening.
- This will carry over to their perspective during witness testimony.

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Communication Theory Techniques

- Since the jury will have the prosecution's perspective first, it may be difficult for the defense to convince them the scene was different from your description.
- The defense should not make sense against the picture you've painted.

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Diagrams/Charts

DEFENDANT S CHARGES

Ct.	Charge	Date	Victim	Spec. Alleg.
1	Robbery	3/6/98	Mary Wilson	
2	Robbery	3/20/98	Dorothy Greene	Used DW
3	Carjack	4/12/98	Sandy Kenwood	Used Firearm
4	Robbery	4/12/98	Sandy Kenwood	
5	ADW	5/9/98	Robert Allen	Used Firearm
6	Robbery	5/15/98	Suzan Thurman	Used DW
7	Rape	5/15/98	Suzan Thurman	Used DW
8	Att. Murder	5/22/98	Tony Medina	Used Firearm

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Diagrams/Charts

CHARGES AGAINST DEFENDANT

CTS	CHARGES	DATE	VICTIM	DEF.	SP. ALG
1	ROBBERY	11/11/00	J. Smith	FIELDS & GRAY	Pers. Use
2	BURGLARY	11/11/00	R. Wilson	FIELDS	Used Firearm
3	KIDNAP	11/11/00	B. Green	FIELDS & GRAY	Used Firearm
4	MURDER	11/11/00	F. Reed	GRAY	Used Firearm
5	RAPE	11/11/00	M. Williams	FIELDS & GRAY	Used Firearm
6	GRAND THEFT	11/11/00	T. Glenn	FIELDS	Used Firearm
7	Poss. For Sale	11/11/00		FIELDS	
8	Sales- Cocaine	11/11/00		GRAY	

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Diagrams/Charts

CHARGES AGAINST DEFENDANTS BY LOCATIONS					
LOCATION	CHARGES	DATES	CTS	VICTIMS	DEFS
123 Maple St.	ROBBERY	11/11/00	5	J. Smith	FIELDS & GRAY
	BURGLARY	11/11/00	2	R. Wilson	FIELDS
	KIDNAP	11/11/00	3	B. Green	FIELDS & GRAY
678 Birch St.	MURDER	11/11/00	1	F. Reed	GRAY
	RAPE	11/11/00	4	M. Williams	FIELDS & GRAY
345 Elm St.	GRAND THEFT	11/11/00	6	T. Glenn	FIELDS
	Poss. For Sale	11/11/00	7		FIELDS
	Sales- Cocaine	11/11/00	8		GRAY

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Communication Theory Techniques

- Legal terms which will be important during the final argument should be woven into the opening statements for familiarity & repetition.
- Don't define the legal terms – could be construed as argumentative.
- If the jurors hear about legal terms in conjunction with applicable facts, they will be in a better position to apply the law appropriately during deliberations.

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Communication Theory Techniques

- Example - Circumstantial evidence case:
- "The State will present circumstantial evidence which establishes the defendant's guilt. The circumstantial evidence will include the fact that clothing described by witnesses was found in the defendant's car and that victim's credit cards were found on defendant when the police contacted him."

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Communication Theory Techniques

- Acknowledge Defenses, without referring to them as such, by incorporating them in with the facts:
 - "This is not a case of consent. This is a case about being cornered & caught off guard. About the Defendant physically overpowering the victim when she had no reason to be on guard, when she least expected it, and when she could not fight back."

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Communication Theory Techniques

- Using PowerPoint / Prezi:
- Make sure PowerPoint / Prezi does not become a crutch and that you remain the Messenger.

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Communication Theory Techniques

- Be Sincere: Speak with sincerity.
- Attorneys are not witnesses and can not testify, however:
- If the jury views you as competent, knowledgeable, prepared, & honest, you may be the most important "witness".
- The jury's trust in you, and your belief in the case, can make a difference in the trial's outcome.

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Avoid

- Re-introducing yourself; ritualistic statements.
- Fidgeting, putting hands in pockets, tapping/clicking pen, jiggling change, twirling hair.
- Standing behind podium or invading the jury's space.
- Pacing back and forth.
- Reading your Opening.
- Telling the jury "My opening is not evidence." or "What the attorneys say is not evidence."

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Avoid

- Repeating cliché phrases:
 - "The evidence will show..." (unless recovering from a sustained objection)
- Apologize for taking up Jurors' time.
- Using legal jargon or cop talk.
- Misstating your case or make it sound better than it is.
- Promising what you can not deliver.
- Committing to testimony you cannot count on.

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Limitations

- Can not argue in Opening Statement.
United States v. Dinitz (1976) 424 U.S. 600.
- Test: ask yourself whether a witness will testify as to what you are saying.

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Limitations

- Can not have an depth discussion of the law.
- Can not state personal beliefs about the case or strength of the evidence.
- Can not comment on Defendant invoking a constitutional right.
- Can not mention inadmissible evidence: In Limine rulings are crucial & must be followed.

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Limitations

- Do Not Overstate the quality or quantity of evidence.
- Only discuss the evidence you, in good faith, believe will be admitted during trial.
- This is ethically correct & strategically sound.
- Don't give the defense attorney the opportunity to argue that you misled the jury.

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In Limine Motions

- Do not mention evidence with questionable admissibility unless you get an advanced ruling on its admissibility. Examples:
 - Admit prior convictions, confessions, character evidence.
- Exclude victim's prior conduct.
- Exclude evidence of witness with no personal knowledge; lack of foundation; information based on hearsay; relevance.

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Objections

- If you draw an objection:
 - Remain calm.
 - Wait for ruling.
 - If appropriate respond.
- If granted – rephrase:
 - “the evidence will show...”
 - “the witness will testify...”
 - “Mr. Wilson will explain that..”

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Defense Opening Statement

- Object?
 - Argumentative.
 - Misstatements of evidence or law.
 - References to inadmissible evidence.
 - References to evidence that should have been provided in discovery but was not.
- If you object, consider something vague, “Objection, pre-trial ruling” & request a sidebar.

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Defense Opening Statement

- Take detailed notes:
- Use for strategy, cross-examination, anticipating, defusing, preemptively dismantling the defense on your direct.
- Take notes of promises made by defense and remember their failure to live up to them for possible commentary during your closing argument.

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CDA**A Resources**

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